

DUPLICATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

FEB -7 2000

LUTHER D. THOMAS, Clerk
By: *SA* Deputy Clerk

BELLSOUTH
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

No. 1:99-CV-0518-JOF

INTERMEDIA COMMUNICATIONS, INC.,
GEORGIA PUBLIC SERVICE COMMISSION,
STANCL O. WISE in his official capacity
as Chairman, LAUREN "BUBBA"
MCDONALD, in his official capacity as
Commissioner, ROBERT DURDEN,
in his official capacity as Commissioner,
and ROBERT B. BAKER, JR., in his
official capacity as Commissioner,

Defendants.

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO INTERMEDIA
COMMUNICATIONS, INC.'S MOTION TO COMPEL PAYMENT INTO COURT**

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to and opposes
Intermedia Communications, Inc.'s ("Intermedia") Motion to Compel BellSouth
Telecommunications, Inc. To Deposit Funds Into Court In Accordance With The Court's Order
(the "Motion"). The Court should deny Intermedia's Motion for two reasons. First, BellSouth
has complied with, and will continue to comply with, the Court's April 30, 1999 Order (Docket
No. 19) ("April 1999 Order") regarding the deposit of funds with the Court. Second, BellSouth
agrees with Intermedia that the rate dispute that has arisen between BellSouth and Intermedia is
not properly before this Court and should be resolved by the Georgia Public Service Commission

(the "GPSC"). The dispute over the appropriate reciprocal compensation rate the parties should be paying in Georgia has nothing to do with the issue presently before the Court, namely whether BellSouth is obligated to pay reciprocal compensation for non-local ISP-bound traffic pursuant to the terms of the parties' interconnection agreement. Consequently, BellSouth regrets that Intermedia continues to attempt to embroil the court in this rate dispute, particularly because, after the filing of the Motion, BellSouth offered to escrow the funds associated with this rate dispute in a separate account pending resolution of the issue by the GPSC. Intermedia rejected BellSouth's offer, proposing instead that the funds be placed with the registry of the court, and remain with the court until the GPSC resolves the rate dispute, even though the rate dispute is not before the Court. Indeed, Intermedia's proposal cannot be squared with its adamant position, as set forth in its Motion, that "this Court is not the jurisdictional forum for...the enforcement issue...." (Motion at 13). For these reasons, BellSouth respectfully requests that the Court deny Intermedia's Motion.

DISCUSSION

I. BELLSOUTH HAS COMPLIED FULLY WITH THE COURT'S ORDER TO DEPOSIT FUNDS INTO COURT.

In its Motion, Intermedia claims that BellSouth has failed to comply with the Court's April 1999 Order by not paying into Court the sums invoiced by Intermedia. Intermedia's position is based on a misunderstanding of the Court's April 1999 Order. In the April 1999 Order, the Court directed "that BellSouth shall deposit with the Court, no later than May 4, 1999, all sums that have been billed to BellSouth by Intermedia *that would be due to Intermedia....*" (April 1999 Order at 2) (Emphasis added). The Court further directed that "BellSouth shall deposit with the Court all sums of disputed reciprocal compensation that have been billed to

BellSouth by Intermedia *that were to be due* between March 1, 1999, and May 11, 1999.” (April 1999 Order at 2) (Emphasis added). Finally the Court held that “BellSouth shall deposit with the Court all further amounts of disputed reciprocal compensation within thirty (30) days of BellSouth’s receipt of an invoice from Intermedia....” (April 1999 Order at 2-3). The April 1999 Order does not specify that BellSouth must pay all amounts invoiced; rather, it specifies that BellSouth must pay into Court the “amounts that would be due” if the Court decided in Intermedia’s favor on the question of whether reciprocal compensation is due for ISP-bound traffic. BellSouth is not obligated, as Intermedia contends, to pay into Court any amount that Intermedia chooses to bill BellSouth. Such an interpretation would lead to absurd results.

Intermedia’s position is that the Court directed BellSouth to pay into Court the “amounts billed by Intermedia.” (Motion at 8). This position, however, is faulty because it reads out of the April 1999 Order the clause: “that would be due to Intermedia.” Because it renders portions of the April 1999 Order superfluous, such a construction is not permissible. The Court specifically limited the payments into Court to those that would be due if Intermedia prevails on the ISP issue. Moreover, however ill-founded its position, Intermedia already seems to be claiming that BellSouth somehow acquiesced in the rate by making initial payments into the Court using Intermedia’s rate. If BellSouth were required by the April 1999 Order to pay into Court all amounts “invoiced,” BellSouth would have to pay based on Intermedia’s rate and thereby potentially jeopardize its chances of recovering these disputed funds from Intermedia.

BellSouth has complied with the Court’s April 1999 Order by paying into the registry of the court the amounts that would be due (i.e. amounts calculated at the appropriate rate) should Intermedia prevail on the ISP issue. Thus, the Court should deny Intermedia’s Motion because it

is based on a misinterpretation of the Court's April 1999 Order and of BellSouth's obligations pursuant to that Order.

II. BELLSOUTH AGREES THAT THE GEORGIA PUBLIC SERVICE COMMISSION SHOULD RESOLVE THE DISPUTED RATE ISSUE.

BellSouth agrees with Intermedia that the rate dispute should be addressed in the first instance by the GPSC.¹ In fact, in an effort to resolve this matter, BellSouth proposed in a letter to Intermedia that:

- BellSouth will continue to pay into the Registry of the court appropriate sums for ISP-bound traffic calculated at the rate BellSouth believes is correct.
- BellSouth will establish a separate, interest-bearing escrow account into which it will deposit the difference in reciprocal compensation using the rate it contends is appropriate and the rate Intermedia contends is appropriate.
- Intermedia may file a petition with the Georgia Public Service Commission for a declaratory judgment on the issue of the dispensation of the funds in the separate escrow account.
- Should the district court case conclude prior to the proceeding at the Georgia Public Service Commission, BellSouth will continue to pay the difference between the rate it contends is appropriate and the rate Intermedia contends is appropriate for ISP-bound traffic into the separate escrow account until the Georgia Commission renders a decision regarding the dispensation of the funds.

BellSouth has attached hereto as Exhibit A a copy of its letter to Intermedia.

The purpose of BellSouth's proposal was to achieve precisely what Intermedia purports to want -- the extrication of the Court from a dispute over rates which both parties agree should be in the hands of the GPSC. Intermedia declined to accept BellSouth's proposal. BellSouth continues to be amenable to depositing the disputed funds in a separate escrow account pending the GPSC's resolution of the rate issue; such an arrangement would guarantee Intermedia that the

¹ It is noteworthy that although it continues to complain about the rate BellSouth is using to pay reciprocal compensation to Intermedia, and although it acknowledges that the GPSC is the appropriate forum to resolve this dispute, Intermedia has not yet decided, for whatever reason, to bring its complaint to the GPSC's attention.

funds will be accrued and ready to pay should it prevail at the GPSC, without further burdening this Court about a dispute that is not properly before it.

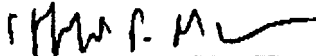
In the alternative, BellSouth will agree to pay the amounts invoiced by Intermedia into the registry of the court so long as no funds whatsoever are disbursed from the registry until the GPSC issues a decision on the rate dispute. Although this alternative will require the Court potentially to maintain the funds in the registry after the Court has issued a decision on the ISP issue, it will address Intermedia's desire to have the disputed funds paid into Court rather than into a separate escrow account.

CONCLUSION

WHEREFORE, BellSouth respectfully requests that this Court DENY Intermedia's Motion and find that BellSouth is in compliance with the Court's April 1999 Order directing BellSouth to pay into Court all sums "that would be due" to Intermedia should Intermedia prevail on the ISP issue. In addition, BellSouth proposes that it either: (1) escrow the disputed funds in a separate escrow fund pending the outcome of the matter before the Georgia Public Service Commission; or (2) deposit the disputed funds with the registry of the court, provided that no funds will be disbursed by the Court until the Georgia Public Service Commission issues a decision on the rate dispute.

This 7th day of February, 2000.

Respectfully submitted,



Matthew H. Patton (Ga. Bar No. 467300)
John F. Beasley (Ga. Bar No. 045000)
Robert P. Marcovitch (Ga. Bar No. 469979)

KILPATRICK STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

Fred McCallum Jr. (Ga. Bar. No. 481517)
General Counsel-Georgia
BellSouth Telecommunications, Inc.
Legal Department
Suite 376
125 Perimeter Center West
Atlanta, Georgia 30346
(770) 391-2416

*Attorneys for Plaintiff BellSouth
Telecommunications, Inc.*

Lisa S. Foshee
Attorney

BellSouth Telecommunications, Inc.
Legal Department - Suite 4300
675 West Peachtree Street
Atlanta, Georgia 30375-0001
Telephone: 404-585-0754
Facsimile: 404-514-4054

January 26, 2000

Scott A. Sapperstein
Intermedia Communications Inc.
3625 Queen Palm Drive
Tampa, FL 33619

Re: *BellSouth Telecommunications, Inc. v. Intermedia Communications, Inc.*,
Case No. 1:99-CV-0518

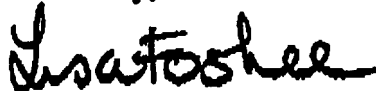
Dear Scott:

As we discussed in our telephone conversation on January 25, 2000, the following is a written statement of BellSouth's proposal regarding Intermedia's Motion to Compel BellSouth Telecommunications, Inc. To Deposit Funds Into Court. Specifically, BellSouth proposes the following:

- BellSouth will continue to pay into the Registry of the court appropriate sums for ISP-bound traffic calculated at the rate BellSouth believes is correct.
- BellSouth will establish a separate, interest-bearing escrow account into which it will deposit the difference between the rate it contends is appropriate and the rate Intermedia contends is appropriate for ISP-bound traffic.
- Intermedia may file a petition with the Georgia Public Service Commission for a declaratory judgment on the issue of the dispensation of the funds in the separate escrow account.
- Should the district court case conclude prior to the proceeding at the Georgia Public Service Commission, BellSouth will continue to pay the difference between the rate it contends is appropriate and the rate Intermedia contends is appropriate for ISP-bound traffic into the separate escrow account until the Georgia Commission renders a decision regarding the dispensation of the funds.

Please let me know at your earliest convenience whether such terms are acceptable to Intermedia.

Sincerely,



Lisa Foshee

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served a true and correct copy of the foregoing **"BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO INTERMEDIA COMMUNICATIONS, INC.'S MOTION TO COMPEL PAYMENT INTO COURT"** by mail, with adequate U.S. postage applied, upon the following:

Newton M. Galloway, Esq.
Dean R. Fuchs, Esq.
Newton M. Galloway & Associates
Suite 400, First Union Tower
100 S. Hill Street
Griffin, Georgia 30224
*Attorneys for Proposed Intervenor
MediaOne Telecommunications of Georgia, LLC*

R. David Powell, Esq.
Assistant United States Attorney
1800 Richard Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30335

Theodore C. Hurt, Esq.
Rachel J. Hines, Esq.
Federal Programs Branch
Civil Division
U.S. Department of Justice
901 E. Street, N.W. Room 927
Washington, D.C. 20004

*Attorneys for Proposed Intervenor
United States of America*

Daniel S. Walsh, Esq.
Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334

Thomas K. Bond, Esq.
Special Assistant Attorney General
c/o Georgia Public Service Commission
47 Trinity Avenue, S.W.
Atlanta, Georgia 30334

*Attorneys for Defendants Georgia
Public Service Commission and for
the Individual Defendant Public Service Commissioners*

Patrick K. Wiggins, Esq.
Wiggins & Villacorta
2145 Delta Boulevard, Suite 200
Tallahassee, Florida 32303
*Attorney for Defendant Intermedia
Communications, Inc.*

John MacLean, Esq.
2 Martin Luther King Drive
Plaza Level East
Atlanta, Georgia 30334
Consumers' Utility Counsel

This 7th day of February, 2000.


Robert P. Marcovitch

INTERMEDIA COMMUNICATIONS INC.

CERTAINTY IN RECIPROCAL COMPENSATION POLICY IS ESSENTIAL TO PREVENT ANTICOMPETITIVE GAMESMANSHIP

David Ruberg, Chairman & CEO

Heather Gold, VP Regulatory

Jon Canis, Kelley Drye & Warren

February 29, 2000

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP

- **BELLSOUTH HAS USED HARASSING
LITIGATION TO DELAY PAYMENT OF
RECIP. COMP. TO INTERMEDIA**
 - Ordered to Pay by FL, NC, GA, TN PUCs
 - Appealed, Stay Denied in FL, NC, GA, Stay
Petition Pending in TN
 - Disputed Payments Now Being Made Pending
Appeal in FL, NC, GA (Direct or Escrow)

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- AFTER LOSING ITS CASES & STAY REQUESTS, BELLSOUTH NOW ARGUES INTERMEDIA'S RATES ARE INCORRECT -- TOO HIGH
 - Focus on a “Multi-Tandem Architecture”
Amendment to the Interconnection Agreement
- THIS LATEST DISPUTE HAS STARTED A NEW ROUND OF LITIGATION

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- **THE MTA OFFERING**
 - Proposed by BellSouth in June 1998 After Asserting That Tandem Trunks in Buckhead, GA Were Exhausted
 - MTA proposed by BellSouth as means for bypassing tandem via alternative trunking
 - Bellsouth convinced Intermedia engineers that MTA was the only way to alleviate exhaust in Buckhead

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- **THE MTA OFFERING (cont'd)**
 - The MTA Amendment Contained a Provision reducing by More Than 70%-80% the Recip. Comp. Rates in Intermedia's Interconnection Agreement
 - Clear That BellSouth Contrived the MTA as a Means of Forcing a Unilateral Reduction in Recip. Comp. Rates

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- **THE MTA OFFERING (cont'd)**
 - MTA Amendment Has Not Been Implemented by Intermedia
 - Accepted as a conditional Offering, if necessary -- was never implemented
 - By time MTA was signed, exhaust apparently was fixed
 - Appears “crisis” was manufactured to force Intermedia to take MTA
 - Amendment Stands as Evidence of Bad Faith & Likely Fraud

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- **THE MTA OFFERING (cont'd)**
 - Violates §251(c)(1) of Act & §51.301(b)(5) of FCC Rules Requiring Good Faith Negotiation
 - Compliance required as precondition to 271 relief
 - May constitute common law fraud

BELLSOUTH's ANTICOMPETITIVE RECIP. COMP. GAMESMANSHIP (cont'd)

- THIS BAD FAITH & HARASSING
LITIGATION MUST BE CONSIDERED
WHEN BELLSOUTH SEEKS 271 RELIEF
 - The *Louisiana II* Order Already Makes Clear
ILECs Must Be Current On Their Recip. Comp.
Obligations To Obtain Relief
 - Must Include Consideration of Meritless
Litigation Impact

RELIEF REQUESTED

- **CONSIDER BELLSOUTH'S BEHAVIOR
IN REVIEWING ANY APPLICATION
FOR 271 RELIEF**
 - Fails to Comply With Good Faith Negotiations
Obligations Under Act §251(c)(1) & FCC Rule
§51.301(B)(5)
 - Fails To Meet The Antitrust Review Mandated
By §271

RELIEF REQUESTED (cont'd)

- **ACTION IN CC DOCKET NO. 96-262**
 - Immediately Upon Affirmation of FCC Position
By D.C. Circuit, Issue Order Adopting FCC's
Tentative Conclusion
 - ISP-bound dialup traffic is interstate
 - But access charge exemption remains
 - Treated as local traffic for compensation purposes

RELIEF REQUESTED (cont'd)

- **ISSUE ORDER IN DOCKET No. 96-262** (cont'd)
 - States May Set New Compensation, But:
 - Must be monetary -- cannot be bill & keep
 - All traffic with long hang times must be treated the same
 - Help desk, ticket reservation, insurance claims
 - ILEC must demonstrate cost differences justify different rate structure
 - Must allow CLECs to justify different rates or rate structures, at their option

RELIEF REQUESTED (cont'd)

- **ISSUE ORDER IN DOCKET No. 96-262** (cont'd)
 - States May Set New Compensation, But:
 - Unless & until states complete rate case & set new, Telric-based rates, FCC must prescribe state-set rate for local traffic as the rate that applies to ISP-bound calls
 - Necessary to provide continuity in case of lengthy state proceedings
 - Needed to avoid harassing litigation that BellSouth has demonstrated

RELIEF REQUESTED (cont'd)

- IN THE UNLIKELY CASE THAT THE D.C. CIRCUIT OVERTURNS FCC:
 - Immediately Issue Order Declaring That ISP-Bound Dialup Traffic Is Local Traffic As Defined By The Communications Act & The FCC's Rules
 - Clarify That Reciprocal Compensation Applies